PETITION NOT PRINTED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 350. MISC.

MABEL BLAIR,
Petitioner,

vs.

JOHN O. COEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT OF RESPONDENT.

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BRIEF AND ARGUMENT OF RESPONDENT.

STATEMENT OF FACTS.

The statement of the facts by the Court, Major, Circuit Judge, delivering the unanimous decision of the United States Court of Appeals for the Seventh Circuit, in the printed opinion of November 9, 1948, has detailed without omission the facts in this case, on pages 1, 2 and 3 of that printed opinion. (Reported in 170 Fed. 2nd 830, with copies in the Transcript of the Record, the printed pamphlet of opinion of this case No. 9538.) We copy it as follows:

"Major, Circuit Judge. This is an appeal from an order of the District Court, entered October 1, 1947,

dismissing debtor's petition in proceedings under Sec. 75 of the Bankruptcy Act (11 U. S. C. A., Sec. 203). The Court held it was without jurisdiction for two reasons: (1) that the debtor did not have a property interest in the land scheduled at the time of the commencement of the proceeding which could be administered under Sec. 75, and (2) that the debtor was not a farmer within the meaning of Par. (r) of said section at the time of the filing of her petition.

"The debtor and her attorney appeared before a Conciliation Commissioner on February 19, 1942, for help and assistance, and the Commissioner prepared a petition and schedules for a composition and extension of time to pay debts. She failed to sign the petition and Schedules A and B. She did sign the separate sheets of the schedules, and she signed the purported oath given by the Conciliation Commissioner to the petition and to the schedules. At that time she paid the Commissioner the necessary filing fee.

"The papers were sent to the Clerk of the District Court on March 5, 1942, but the Commissioner neglected to enclose the filing fee. The papers were returned to the Conciliation Commissioner on March 7, 1942, by the Clerk with the statement that (1) there was no fee enclosed, (2) that the petition and schedules were not signed, (3) no notary seal had been placed on any of the documents. Both the Conciliation Commissioner and her attorney endeavored to locate the debtor but were unable to do so for a period of more than four months. Finally, when located, she supplied her signature which had formerly been omitted from the petition and schedules, which were then sent by her attorney to the Court for filing. At the same time, the Conciliation Commissioner sent to the Clerk the filing fee which he had previously failed to

remit. Neither the petition nor the schedules were verified anew and bore the same date as when originally executed. The petition and schedules were filed by the Clerk on June 24, 1942.

"The debtor in Schedule B claimed as her property certain described land, and with reference thereto stated: 'The above land subject to mortgage to Ed. Rudolphi, which was foreclosed in the Circuit Court of Richland County, Illinois, and sold under decree of that Court, the sale having been March 15th, 1941, and the Equity or (of) Redemption only being owned by petitioner.'

"As the schedule notes, the property claimed was sold under a mortgage foreclosure sale March 15, 1941, and a certificate of purchase was issued to the purchaser, Ed. Rudolphi. Under the Illinois law, the debtor (mortgagor) had one year in which to redeem from such sale and her creditors had an additional three months. No redemption was had and her right to redeem expired on March 15, 1942, and that of her creditors on June 15, 1942. On June 16, 1942, Rudolphi presented his certificate of purchase to the Master and requested a deed, which was issued to him on July 9, 1942, and recorded the following day, July 10, 1942. Subsequently, Rudolphi assigned his interest in the property to the instant appellee. The debtor's contention that she was the owner of a property interest of which the Court acquired jurisdiction is predicated solely upon the interest which she claims by reason of her right of redemption. This in turn is dependent, so we think, upon the date on which the Court acquired jurisdiction, that is, whether it was on February 19, 1942, when the debtor first appeared before the Conciliation Commissioner, or June 24, 1942, when the petition and schedules were filed with the Clerk of the

Court. As already noted, the period of redemption expired prior to the latter date."

We have copied the above statement of facts in full, on account of some inaccuracies in debtor's petition, such as the statement on page 5, under date of Feb. 19, 1942, that "she signed and took the oath as directed by him" (the conciliation commissioner), and "she left her petition and schedules with the conciliation commissioner for forwarding to the clerk"; and on the same page 5, under date of June 24, 1942, "The petition was received by the clerk from the conciliation commissioner and filed."

The true facts are that the petition and schedules were not signed before the conciliation commissioner, and not signed until more than four months after February 19, 1942, and after her right to redeem, and that of her creditors, had expired; and then the papers were signed before her own attorney, who had requested them from the conciliation commissioner, and without changing the date of the purported verification of the conciliation commissioner, and without any new verification, and without changing the date of the papers, the documents were sent in to the clerk of the court for filing, by her attorney, who offered to send in a filing fee, if the conciliation commissioner did not forward it.

(Printed Record pages 63, 64 and 65, and Creditor's Exhibits Nos. 1, 2 and 3, at pages 80, 81 and 82.)

The papers were unexecuted and incomplete when sent in by the conciliation commissioner in March, 1942, and were rejected, and one of the three grounds was that there was no filing fee included; and the same papers were still defective and incomplete, and in addition were untrue, when filed on June 24, 1942, after all equity and right of redemption had expired.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

POINT I.

All questions involved in this case have become "moot" and academic, since no supersedeas bond was filed on the appeal from the final judgment of dismissal for lack of jurisdiction by the District Court on October 1, 1947, and consequently the alleged equity of redemption claimed by petitioner has long since terminated, and even under debtor's theory debtor can now have no interest in the subject matter of this case.

DISCUSSION.

Debtor wants to date the jurisdiction of the court from February 19, 1942, when she applied to the conciliation commissioner to help her in preparing her papers, and not from June 24, 1942, when her attorney filed the incomplete papers in court, and include as her property the equity of redemption which she still had on February 19, 1942.

Assuming (for the purpose of the motion that was filed on February 28, 1948, in the Circuit Court of Appeals) that the District Court was wrong on every point appealed from, including the matter of the date of jurisdiction (that is, whether the court took jurisdiction on February 19, 1942, when she consulted with the conciliation commissioner, or on June 24, 1942, when her attorney filed incomplete papers in court), since no supersedeas bond was filed on the appeal to the Court of Appeals this claimed equity of redemption has long since run out, and neither the Court of Appeals nor the District Court has any subject matter to take jurisdiction of.

Moore's Federal Practice (1938), Federal Rules of Procedure, Vol. 3, at pages 3290-3291 and page

3299, Sec. 62.04, Rule 62 (d), Sup. Court, and Rule 73 (d) of Federal Rules of Procedure on Appeal to the Circuit Court of Appeals;

Collier's Bankruptcy, 14th Ed. 1938, Vol. 2, page 931, par. 25.12.

Also:

Cumulative Supp. Moore's Collier (1946), page 123, Sec. 25.12, citing In re Meshberger, 131 Fed. 2nd 287.

Rule 62 (d) is as follows:

Stay on Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay.

Cyclopedia of Federal Procedure, 2nd Ed., 1944, Vol. 11, page 494, Sec. 5891, has the following on the same subject:

"The judgment or decree of a trial court, even though it prove on appeal to have been erroneous, is operative unless superseded or in some manner stayed pending the appeal,"

and cites McLaughlin v. Berens, 128 Fed. 2nd 23 (1942, C. C. A., D. C.), and United States v. Mancuso, 139 Fed. 2nd 90 (1943, C. C. A. 3), among many other earlier cases.

In McLaughlin v. Berens, 128 Fed. 2nd 23, there had been a restraining order against defendant, which was dismissed by the trial court, and the plaintiff appealed without giving a supersedeas bond. The Circuit Court of Appeals held that upon dismissal of the restraining order the decree of the trial court, even though it is reversed, is operative, and a state court can proceed with an execution for a writ of assistance for possession.

In United States v. Mancuso, 139 Fed. 2nd 90 (1943), the plaintiff was convicted for not reporting for induction under the Service Act, while there was a stay order pend-

ing from the District Judge against the Board for inducting. The court freed plaintiff of conviction, although the stay order or injunction of the District Court was erroneous.

In Skinner v. Dingwell, 134 Fed. 2nd 294, the court dismissed debtor's petition because he was not a farmer and vacated an injunction against the issuance of a sheriff's deed. No stay order or supersedeas bond was given on appeal to the Circuit Court of Appeals and the court held the question had become "moot."

In 161 A. L. R., at page 933, in the notes comments on the case of In re Meshberger (1942), reported in 131 Fed. 2nd 287, and quoting from the syllabus:

> "Where the period of redemption without redemption being made pending appeal from the order fixing the value of farmer-debtor's property and the time for redemption thereof, and there was no stay bond or injunction to prevent sale of the property after expiration of the redemption period, whether the order provided for too long a period of redemption became a 'moot question,' and hence could not be considered by the Circuit Court of Appeals."

In re Meshberger was again before the Court of Appeals and reported in 138 Fed. 2nd 954 (1943), rehearing denied Jan. 3, 1944, certiorari denied 322 U. S. 736, and rehearing denied 322 U. S. 771. The decision is quoted from to show that "times fixed by statutory or judicial edict" are definite; that the "time to redeem is" not one "of elastic duration that would be a right without end."

All the rules of Court, the textbooks and the decisions follow the same principle that even if the petitioner has a right at the time of a final decision of dismissal, when he appeals he must preserve that right by a stay and a supersedeas bond for the protection of the other party.

When the District Court dismissed debtor's petition on jurisdictional grounds the judge also "vacated and set aside any order of injunction or otherwise which deprives or purports to deprive the owner of the land in question through the Master's deed of possession of the land" (Printed Record, page 103, par. [7]). So, again, assuming and supposing for the benefit of the debtor that in some mysterious way this alleged equity of redemption survived and still existed and had been extended or held in abeyance so that it existed on October 1, 1947, at the time the court gave a final decision and dismissed the proceedings for a complete lack of jurisdiction, then upon such dismissal the equity of redemption had to begin to run, and at the date of February 28, 1948, when the motion to dismiss was filed in the Appellate Court, more than four months after such dismissal, it had expired.

Once the equity of redemption has expired by statutory law and the period fixed for its duration, it cannot be recreated or revived. It is ended for all time. So it becomes a "moot" question and purely academic, whether the "leaving" of an unexecuted and incomplete petition and schedules with the conciliation commissioner on February 19, 1942, asking him to file them with the Clerk of the Court (but which were never filed) gave the court jurisdiction of this equity of redemption which debtor claims.

Respondent therefore asks the court to deny the petition of certiorari prayed for, because the questions are all "moot" and frivolous, and petitioner has no interest that a bankruptcy court can take jurisdiction of.

POINT II.

No properly signed and verified petition and schedules were ever "left with" or "received by" the conciliation commissioner to be sent to the Clerk for filing, since the

conciliation commissioner had no authority to administer an oath to the petitioner until she was a witness in a case referred to him, and no properly signed and verified petition and schedules were ever filed with the court, not even on June 24, 1942, by petitioner's attorney.

Therefore it is entirely a hypothetical, frivolous and "moot" question under the facts in this case, what effect, if any, the "leaving of a petition with the conciliation commissioner" might have on an equity of redemption, since there **was no filing** of any kind of papers with the Court until June 24, 1942, after the equity or right to redeem had expired.

DISCUSSION.

It is perfectly clear from an examination of the record and all the circumstances that when Mrs. Blair's attorney sent in the old papers that were filed on June 24, 1942, it was in pursuance of an understanding between Mrs. Blair and her attorney, who had been her attorney in the foreclosure proceedings, and both of whom knew that at that date the equity of redemption had expired, with the deliberate intent of retaining possession of the property through the power of the federal court in bankruptcy. This misrepresentation of the true facts misled the court and was an imposition upon the court that took jurisdiction of the case. (See Creditor's Exhibits Nos. 1, 2 and 3, pages 80, 81 and 82 of the Printed Record; also testimony of conciliation commissioner, pages 64 and 65 of Record.)

Such evidently was the conclusion of Judge Wham in his opinion when he dismissed the case (Printed Record, page 106, middle of page), when he said:

> "Clearly, it seems to me now that all the facts are before me, the holder of the Certificate of Purchase and his successors have been wrongfully deprived of

the right of possession and use of the land in question since July 9, 1942, when the Master's deed was delivered; that the debtor and her husband have had the use of the land during that time without right under the law due to the failure of the parties concerned sooner to bring the jurisdictional facts in the case to the attention of the court."

Texts, Statutes, General Orders and Decisions on the Function and Power of Referees.

The conciliation commissioner is a sort of "special referee" or a "particular kind of referee," but his jurisdiction is solely in that of cases "referred" to him. He has no authority to act generally as a Notary Public to administer oaths, but solely in cases referred to him by the court and when the case is pending before him.

Collier's Bankruptcy, 14th Ed. 1940, Vol. 2, page 1395, as to the powers of conciliation commissioners, and the jurisdiction of referees. 11 U. S. C. 203 (Sec. 75). Supplement to Collier's (1946), page 170, cites Federal Land Bank v. Castanien, 116 Fed. 2nd 589 (C. C. A. 6th, 1941), on the limited jurisdiction and power of a referee.

Collier's Bankruptcy, 14th Ed., 1940, Vol. 2, page 1391, quotes 11 U. S. C., Chap. 5, Sec. 66, par. 38, on the **Jurisdiction of Referees:**

> "Referees are hereby invested, subject always to a review by the judge, with jurisdiction to (1) consider **all petitions referred to them** and make the adjudication or dismiss the petitions, (2) exercise the powers vested in courts of bankruptcy **for administering of oaths to** and the examination of persons or witnesses . . . **in proceedings before them.**"

In the U. S. v. Simon, 146 Fed. 89 (1906), which was a case of perjury against a creditor for making a false claim,

the creditor denied the power of a referee to administer any oath, but the court held:

> "There is no doubt in my mind that this law (bankruptcy) does expressly authorize an oath to be administered by a referee in bankruptcy to a witness appearing . . . to give testimony in support of claims presented by alleged creditors."

This was a matter pending before the referee, and the court held the referee had authority to administer an oath **in a proceeding before him.**

11 U. S. C., Chap. 4, Sec. 41, par. 18-c (as amended by the Act of 1938), par. 1 (9), Definitions: " 'Court' means the judge or the referee of the court of bankruptcy **in which the proceedings are pending.**"

Collier's on Bankruptcy, Vol. 2, 14th Ed., 1940, at page 78: "All pleadings setting up matters of fact shall be verified under oath."

11 U. S. C., Chap. 1, Sec. 1, **Meaning of Words and Phrases:**

> "(13) 'Date of bankruptcy,' 'time of bankruptcy,' 'commencement of proceedings' or 'bankruptcy,' with reference to time, shall mean the **date when the petition was filed.**
>
> "(24) 'Petition' shall mean a document **filed in a court** of bankruptcy or **with a clerk thereof** by a debtor **praying for** the benefits of this Act."

General Order in Bankruptcy of the U. S. Supreme Court (in effect February 13, 1939):

G. O. No. 50 (2):

> "The clerk shall not accept the petition unless it is accompanied by the filing fee and the schedules, which

shall be in duplicate. Upon **the filing** of the petition the judge shall enter an order either approving it as properly filed under the section, or dismissing it for want of jurisdiction. If the petition is approved the case shall be referred."

G. O. No. 50 (11):

"In so far as is consistent with the provisions of Sec. 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy, and the general orders in bankruptcy shall apply to proceedings under said section."

In Donald v. Bankers Life Co., 107 Fed. 2nd 810 (C. C. A. 5) (rehearing denied January 15, 1940), at page 811:

"Sec. 75 specifically provides that the conciliation commissioner shall exercise and perform the functions of a referee whenever necessary in a farmer-debtor proceedings **referred to him.**" "It is evident that Congress considered the nature and functions of the office of referee as so well established by the previous acts and decisions thereunder that no further definition was required."

At page 812, after reviewing the creation of the office of referee by Sec. 33 of the Act of 1898 (11 U. S. C. A., par. 61), the court proceeds:

"It will be noted that the primary power to proceed is vested in the judge of the bankruptcy court, **and no power vests in the referee** other than by the **entry of an order of reference.**"

Page 812, second column:

"In no sense can it be said that the referee is a separate court or is **endowed with any separate judicial** authority." Citing Weidhorn v. Levy, 253 U. S. 268, at 271.

"It is evident that these principles govern in the interpretation of said Sec. 75. The fact that this section designates the conciliation commissioner as the referee in bankruptcy before whom the estate will be administered, if administration becomes necessary, **neither invests that officer with any greater authority than is conferred upon the court, nor takes from the judge the primary control over the proceedings** vested in him as its presiding officer."

Jurisdiction of the Court and the Filing of a Petition Under Sec. 75 (a to r).

Sec. 75 (c), under which the original petition must be filed, and which gives the court its jurisdiction (as interpreted by G. O. No. 50 of the Supreme Court) is as follows:

"A petition **may be filed by any farmer** stating that it is desirable to effect a composition or an extension of time to pay his debts. **The petition** and answer **shall be filed with the court,** but shall, on request of the farmer, be received by the conciliation commissioner . . . and promptly transmitted by him **to the clerk of the court for filing.**"

In subsections (d) and (e) of Sec. 75 it is found that "**after the filing of the petition**" the inventory shall be filed by the farmer. And in subsection (e), "**after the filing of the petition**" the court shall exercise control over the property of the farmer.

There is nothing here about the conciliation commissioner taking upon himself any judicial powers, or acting otherwise than as directed in Sec. 75 (q) as attorney to "assist any farmer **in preparing and filing a petition.**" In the case at bar the conciliation commissioner never did get any petition **to the clerk for filing**; a petition was accepted by the clerk for filing from debtor's attorney more than

four months after the consultation with the conciliation commissioner about filing a petition. Did the conciliation commissioner "exercise control over the property of the farmer" during these four months **until the court** could **get jurisdiction** under Sec. 75 (e)? And if the conciliation commissioner had control for these four months (and that is what petitioner is claiming) **just how and just when** did he divest himself of the control and jurisdiction and transfer it to the Court?

Asking the questions shows the absurdity of the claims.

The above jurisdictional subsection (c) must be read in conjunction with both paragraphs of Sec. 75 (n) and subsection (q), as well as with the directions of subsections (d) and (e), all of which are merely explanatory and directive as to the procedure, but do not undertake to extend or enlarge or change the jurisdiction of the court, which says that **"the petition shall be filed with the court,"** . . . or if **"received by the conciliation commissioner"** must be "promptly transmitted by him **to the clerk of the court for filing."**

Sec. 75 (n) is perfectly clear when read from the beginning to its end, and shows when the "equity of redemption" is affected by the jurisdiction of the court, which is **"at the time of the filing of the petition,"** and **is not at the time of leaving the petition with the conciliation commissioner** or with any other attorney.

The essential parts of paragraph first is as follows:

> "The filing of a petition or answer **with the clerk of the court,** or leaving it with the conciliation commissioner for the purpose of forwarding same **to the clerk of the court,** praying relief, . . . shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the ex-

clusive jurisdiction of the court, including any equity or right in such property, including, among others . . . **the right or equity of redemption where the period of redemption has not or had not expired . . . at the time of the filing of the petition.**"

It is certainly difficult, in fact impossible, to give to this paragraph the meaning which petitioner contends for, except by omitting altogether (as petitioner did on page 2 of her petition for certiorari) the last phrase of the paragraph: "**at the time of the filing of the petition.**" Such a mutilation would not be within the province of a court.

While the meaning of this paragraph is perfectly clear as it stands, it is a little confusing on account of its length and complexity. Nevertheless, it would make the reading easier and without confusion if the adverbial "time" expression "**at the time of the filing of the petition,**" which seems to modify everything that goes before in the paragraph, were inserted at a point more closely to the word it modifies in the sentence, for example, just after the word "shall" (which it undoubtedly modifies and was intended to fix the time "when"), so that this portion of the paragraph would read: "leaving it **(the petition)** with the conciliation commissioner for the purpose of forwarding same **to the clerk of the court, praying relief** . . . shall **at the time of the filing of the petition** immediately subject the farmer and all his property, wherever located, . . . to the exclusive jurisdiction of the court, etc., etc."

The mind to get a clear conception of the meaning of the paragraph must flash the meaning of the adverbial "time" expression back to some point just as has been suggested above. But by further simplification and retaining only the essential phrases, the paragraph would read: "leaving it **(the petition)** with the conciliation commissioners for the purpose of forwarding same **to the clerk of the court, pray-**

ing relief . . . shall immediately subject the farmer and all his property, wherever located, to the exclusive jurisdiction of the court . . . including . . . the **right or equity of redemption where the period of redemption has not or had not expired** . . . AT THE TIME OF THE FILING OF THE PETITION."

But the second paragraph of Sec. 75 (n) makes absolute and admits of no doubt about the meaning. It follows: In all cases **where, at the time of the filing of the petition, the period of redemption has not or had not expired** . . . **the period of redemption shall be extended,** etc."

There is nothing here about **extending** a period of redemption except that it existed **"at the time of the filing of the petition,"** and as the court can only take jurisdiction of an equity of redemption that is **in existence at the time of the filing of the petition,** according to the first paragraph of Sec. 75 (n), in so far as any right or equity of redemption is concerned, all jurisdiction is **at the time of the filing of the petition.**

That is precisely what the Court of Appeals held, and the hypothetical question as to what property, if any, might come under the jurisdiction of the conciliation commissioner in a case where a petition is left with him to be filed with the clerk is not in this case at all. The Court of Appeals said at page 4 of its opinion: "This language is directly applicable to the instant situation where the only property claimed was the right of redemption."

The petitioner admitted in her briefs in both the District Court and the Court of Appeals that there was no filing of a petition until June 24, 1942. In petitioner's brief in the Court of Appeals, at page 18: "It is agreed that the **clerk properly declined to file** the petition because the $10.00 filing fee . . . did not accompany it."

But now the petitioner objects to the holding of the Court of Appeals (page 2 of her petition for certiorari):

> "The court below held that it is only the **filing** of the petition with the **clerk** (not the **leaving** of it with the **conciliation commissioner** for forwarding to the clerk) that subjects the property and extends the period of redemption" (above emphasis by petitioner in her petition).

Had petitioner, in quoting Sec. 75 (n), put in the phrase **"at the time of the filing of the petition,"** which is contained in both the first and second paragraphs of subsection (n), it should have been perfectly clear to her that the jurisdiction of the court, of an equity of redemption, and the court's power to extend the period of redemption, are both limited very exactly by the expression **"at the time of the filing of the petition,"** and that in the facts of this case it is a hypothetical and purely academic question that petitioner wants determined from her writ.

Some Statutes and Decisions.

11 U. S. C. A., Chap. 1, Sec. 1, **Meaning of Words and Phrases:**

> "(24) 'Petition' shall means a document **filed in a court** of bankruptcy or **with a clerk thereof** by a debtor praying for the benefits of this act."

In In re Weir, 42 Fed. Supp. 23 (1941), it is said:

> "The original petition in Agricultural compositions and extension proceedings must be filed **with the Clerk of the Court.**"

And, then, in In re Wagner, 64 Fed. Supp. 481 (1946), at page 483 (4):

> "Proceedings are **commenced by the filing of the original petition** and the court's jurisdiction attaches at the same time."

DISCUSSION.

Ths fanciful and fantastic concept or theory of petitioner about "leaving a petition with the conciliation commissioner" has no application under the facts in this case, and the statute (11 U. S. C. A. 203, Sec. 75) expressly fixes the time or date of the jurisdiction of the court **at the time of the filing with the court**, and it expressly limits the jurisdiction of the court of an equity of redemption that **has not expired at the time of the filing of the petition.**

Therefore the court should not be called upon to consider this hypothetical and academic question, which does not arise under the facts of this case.

POINT III.

Petitioner had no right to redeem or any equity of redemption in these lands on June 24, 1942. She had no property interest or beneficial interest of any nature which a bankruptcy court could take jurisdiction of and administer for her benefit.

Decisions.

State Bank of Hardinsburg v. Brown, 317 U. S. 135;
Jelkes v. Aetna L. Ins. Co., 124 Fed. 2nd 810 (C. C. A. 10, 1943);
In re Chrisman (Cal.), 35 Fed. Supp. 282 (1940);
In re Tracy, 80 Fed. 2nd 9 (1935);
Stephens v. Ill. Mut. F. Ins. Co., 43 Ill., at 327;
Louisville Joint St. Land Bank v. Radford, 295 U. S. 555.

Statutes.

Ill. Rev. Stat., Chap. 77, Secs. 16 to 20 and 30, 31;
U. S. C. 11, 203 [Sec. 75 (n)].

Texts.

Jones on Mortgages, 7th Ed., Vol. 2, Secs. 1661, 1051, 1051a.

DISCUSSION

Of Point 2 of the Reasons for the Writ.

Had petitioner been more careful in her statement, this brief might have been much shortened. For example, on pages 7 and 8 of the petition (IV, Point 2) the petitioner states the following as **a second reason for allowing the writ of certiorari:**

> "The said appellate court has decided an important question of local law in a way which is in conflict with the applicable decisions of the courts of the State of Illinois."
>
> "This refers to the State decisions under Illinois Statutes holding that **all of a mortgagor's title and rights in his mortgaged estate remain intact throughout foreclosure proceedings until a deed is taken by the purchaser.** The appellate court held to the contrary that under Illinois law delivery of the deed is a mere ministerial act, **and title had already passed prior** to delivery of the deed."
>
> "The Illinois Statute and the Illinois decisions which are very numerous are cited and quoted at pages 24 to 33 of the accompanying brief in support of this position."

Neither of the above emphasized statements is correct. The Illinois decisions do not hold that "**all** of a mortgagor's title **and rights** . . . **remain intact until a deed is taken** by the purchaser." Not one single case cited by petitioner holds the above.

What all the cases cited do hold, and all the others that respondent knows about, is that the **title** remains in mort-

gagor or his assigns until the Master transfers the title by delivery of the deed. Illinois is under the common law, but mortgages, foreclosure proceedings, and particularly the right to redeem from a sale, are purely statutory.

It is ordered by the statute and by the decree of foreclosure that the Master shall deliver a deed to the holder of the certificate of purchase upon the happening of a certain event, which event is at the expiration of the fifteen months from the date of sale without redemption; and upon the happening of such definite time the purchaser is **entitled to a deed**, upon his request and delivery of his certificate to the Master (Ill. Rev. Stat., Chap. 77, Secs. 16 and 30; IV, page 85, Printed Record, Decree).

And it wouldn't matter whether that bare, naked title were remaining in the mortgagor or his assigns, the Master transfers it to the purchaser by his deed (the Master's deed), and it is this act of transferance which **is a ministerial act.**

Secondly, the Court of Appeals did not hold **"and title had already passed prior to delivery of the deed."** The Court of Appeals held that upon request of Rudolphi and the delivery of his certificate of purchase on June 16, 1942, to the Master, the Master's making and delivery of the deed **(transferring the title)** was a ministerial act.

We quote from the decision (bottom of page 5 of pamphlet opinion in the transcript):

> "Under that decision (State Bank of Hardinsburg v. Brown, 317 U. S. 135) the issuance of the deed by the Master was only a ministerial act, and any delay on his part in executing the deed could not restore to the debtor what she had lost by the expiration of the period of redemption on June 15, 1942. At the most, the debtor after such expiration had nothing more

than a naked legal title which was of no benefit to her in the instant proceeding." In other words, she had no beneficial or property interest.

Title and Rights of Mortgagor.

Petitioner is very careless and inaccurate in her statements about the **rights** of mortgagor during and following the fixed period for redemption, and particularly what **rights** remain to mortgagor **after** the time for redemption has expired. Therefore, we will quote from two of the cases which petitioner relies upon so strenuously to sustain her incorrect statement in the petition already referred to above.

Justice Cartwright, in the case of Bradley v. Lightcap, 186 Ill. 510 (1900), at page 532, quotes from Stephens v. Ill. Mut. F. Ins. Co., 43 Ill. 327, at page 331, as follows:

> "His estate, as mortgagor, would not have been lost until expiration of his right to redeem. In this State the purchaser under a sheriff's sale upon judgment and execution, or at a master's sale on foreclosure of a mortgage, acquires by his purchase no new title to the premises **until the period of redemption has passed** and **he is entitled to a deed. His deed will relate back, it is true, to the beginning of his lien in order to cut off intervening creditors.**" (Emphasis supplied.)

In this Blair case to the time when the mortgage was given in March, 1926, and Rudolphi had taken his first title from mortgagor, as mortgagee.

Justice Cartwright, again speaking:

> "The mortgagor still has the estate of a mortgagor, but **the amount and time of redemption** have become absolutely fixed by the decree of sale" (citing 2nd Jones on Mortgages, Sec. 1661, 7th Ed.). (Emphasis supplied.)

Justice Wilkins, dissenting in the same case of Bradley v. Lightcap, also quotes from Stephens v. Ill. Mut. F. Ins. Co., 43 Ill. 327, at page 331, as follows:

> "His title becomes absolute only when his right to a deed accrues. If it is sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor with this qualification: **that the amount and time of** redemption have become absolutely fixed by the decree and the sale, **and his estate will be absolutely divested if he fails to redeem within the allotted time.**" (Emphasis by Justice Wilkins.)

These statements of the Illinois law are quite distinct from those of the petitioner. The estate of the mortgagor is not lost **until expiration of his right to redeem;** after that expiration he has a naked legal title, but **no** "estate," no property right or interest.

Judge Wham in the District Court (bottom page 105 and top of page 106, Printed Record) makes very careful statements about the Illinois law and the right of the mortgagor after the expiration of the time of redemption, and found there was no equitable or beneficial interest in mortgagor, after such time, that could be enforced, or that a bankruptcy court could take jurisdiction of.

The Court of Appeals (already quoted) held: "At the most, the debtor . . . had nothing more than a naked legal title."

In re Chrisman, 35 Fed. Supp. 282 (Oct., 1940), a California case, is directly in point:

> "Sec. 75 deals only with property which the debtor owns, or in which he has some **interest,** citing In re Tracy, 80 Fed. 2nd 9 (1935); U. S. Nat'l Bank of Omaha v. Pamp, 83 Fed. 2nd 493 (1936).

"The Court is without power to subject to administration the property of another, in which the farmer debtor **does not have** or **cannot legally claim an interest.** Occupany of land while awaiting delivery of instruments in escrow does not give rise to any interest in it contrary to the conditions in the escrow instruments."

This was a case very similar to the present. There was a breach of the contract and the contract was terminated; but after the contract was terminated for the breach the purchaser entered bankruptcy (just as in the present case, after the right to redeem had expired), and on account of his occupancy, proper at the time possession was taken, and by sufferance after the breach, tried to retain possession and claim ownership and a property interest, which would let the bankruptcy court administer the lands for his benefit. In principle it is exactly the case at bar. An occupancy by sufferance, or an occupancy by holding over after all rights have terminated, is not a property interest.

Petitioner is certainly persistent in trying to get something for nothing; take it away from those who have and give it to those who have not. And so in her petition (second issue involved, bottom of page 3) she states:

"Her farm was subject to the exclusive jurisdiction of the federal court for **all purposes** of Sec. 75, which includes a distinct right of redemption which is **created** (as distinguished from extended) by the Act." (Emphasis by petitioner.)

And in her brief (bottom page 35):

"Not only does Sec. 75 **extend** any existing right of redemption provided by state law, but it also **creates** such right if none existed under state law." (Emphasis by petitioner.)

Well! We will admit that Sec. 75 has gone a long ways, but it has not yet reached the Robin Hood stage. Besides, the Supreme Court in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, held that the Fifth Amendment is still in force, and that private property should not be taken without compensation.

State Bank of Hardinsburg v. Brown, 317 U. S. 135 (rehearing denied) is attacked by petitioner in her petition (page 8, under third reason for allowing the writ at [a]) because the Court of Appeals applied this sound and well-established principle of law. It was followed in Jelkes v. Aetna Life Ins. Co., 134 Fed. 2nd 870 (C. C. A. 10, 1943), which was not a case under Indiana law. Following the principle enunciated in State Bank v. Brown, in the Jelkes case it is said:

> "Where **debtor's petition is filed** subsequent to foreclosure sale (and foreclosure **sale** cuts off **right to redeem)**, bankruptcy court acquires no jurisdiction over such property."

But the State Bank v. Brown states a principle much more important and universal than for any peculiarities of the Indiana law as the quotation following shows:

> "The question then is, should section 75 (n) be so read that, although the debtor has no interest or equity in the land which has been sold, and is at most a trustee of the bare legal title, the land is to be drawn into the bankruptcy if the sheriff has not delivered his deed at the date of the initiation of the proceedings.
>
> "The petitioner replies (to above question) that the fair meaning of the section as a whole is that only if the debtor still retains an **equity of redemption** does the land come under the bankruptcy jurisdiction . . . We hold with the petitioner.
>
> "It seems clear that if no right of redemption exists there can be no period of redemption to extend."

To overturn this decision of the State Bank v. Brown would put us right back and up against the Fifth Amendment to the Constitution. The Court would then have to declare Sec. 75 as unconstitutional for taking private property without compensation. These propositions and "creating" a right of redemption where none exists, as petitioner wants done, are not sound reasons for allowing a writ of certiorari. Such an application or petition should be addressed to the Congress.

POINT IV.

Debtor was not a "farmer" as defined by the statute when she filed her petition and, according to her own testimony, was not engaged in farming operations of any kind, nor did she receive any income from the farm. She was not a "farmer" under either alternative of Sec. 75 (r), but received the principal part of her income from traveling activities.

Decisions.

Thompson v. Fed. Farm Mort. Corp., 140 Fed. 2nd 539, 1944;

In re Horner, 104 Fed. 2nd 600 (C. C. A. 7).

Statute.

11 U. S. C. [75 (r)].

The Rule.

"The test in determining whether a debtor seeking a composition of creditors under this section was a farmer within the meaning of this Act, was whether he was either primarily bona fide personally engaged in producing products of the soil, or whether the principal part of his income was derived from his activities in producing products of the soil" (In re Horner, cited above).

DISCUSSION.

Debtor alleges she was a farmer when she filed her petition, and when this matter of jurisdiction is put in question it is her duty to prove such allegations by a preponderance of the evidence.

There are some facts scattered through the documents and files of the court that show something of the situation, and we can do no better than to quickly summarize some of these, taken from our brief in the Court of Appeals.

From the time debtor took over the title to the property from her husband in 1933 up to the time of the foreclosure proceedings in 1940, no interest was paid on the mortgage and some $1200 was due by then.

Debtor ceased to pay taxes on the property after 1938 and the taxes for the years 1939, 1940, 1941 and 1942 were paid by Rudolphi to protect his title.

Report of the conciliation commissioner (pages 11 and 12 of Printed Record), "nothing found to appraise of the original schedule B-2, which was listed at $102.20."

Report of conciliation commissioner of the so-called accounting of Russel Blair for the years 1944 and 1945:

> March 1/44 to March 1/45—Received, $56.62½; expenditures, $123.30½.
>
> March 1, 1945, to March 1, 1946—Received, $84.50; expenditures, $177.18.

(Photostatic copies in original transcript at pages 24 and 25, but not in Printed Record. However, mentioned in Record at bottom page 12.)

Our purpose in calling attention to these records is to show what debtor failed to show positively. It will be noted

that in the inventory (pages 76 and 79, Printed Record) there is no machinery, no hay wagons, no wheat drills or corn planters. There is no livestock, pigs, cows, chickens, no farm tools of any kind or nature; no seed for crops to be planted, no crops from the year then in progress. There was no furniture in the house, no fruit or vegetables of the many, many gallons canned around 1938 and in the following years, according to Mrs. Blair's testimony.

There are no harrows, no plows, no cultivators, no spraying outfit, no hose, rakes, axes, shovels or forks, not even a nail and hatchet with which to fix a fence or repair a roof or nail a board on the barn. All the incubators, chicken lots and fencing and housings, and all the fruit trees, peach and apple, and all the canned fruit and vegetables, as well as the money obtained from the wonderful peach crop of 1938, has disappeared and evaporated by 1942 when Mrs. Blair filed her petition and made her schedules and inventory, and not even the $102.20 of personal property could be found when appraisers went to look for it.

The complete lack of this farm, dairying and nursery equipment when Mrs. Blair made her schedules, but which she must have had to carry on her extensive and intensive farming in earlier years, shows that her intentions about doing any farming had changed completely, and that on February 19, 1942, she didn't have her mind on farming.

Testimony.

But the testimony of petitioner, herself, as well as that of witnesses, is conclusive, that she had not been farming, did not get any income from the farm, and did get considerable income from other activities.

About the only question asked Mrs. Blair by counsel for respondent was whether all that she had recited to us

about her farming activities on her direct examination referred to about the year 1938. She answered: Yes. Well, to 1940 (third question, page 41, Printed Record).

In 1941 debtor made an average of $1800 annually at other work and the farm would not pay the taxes (middle page 44 and at bottom page 44, Printed Record).

In 1941 and afterward debtor was scarcely on the farm at all (Printed Record, pages 50, 51, 52, questions by the court).

(Page 70, Printed Record) Question by the court to the conciliation commissioner. The answer: "I don't think I ever saw her from that time on, as far as I know" (Time of February 19, 1942, preparing her papers).

Three witnesses, who had farms adjoining the one in controversy, testified to just one point, and that was that Mrs. Blair had not lived on the place during more than the past five years; that they had not seen her around there; that she had not been doing any farming to their knowledge in that time (pages 53 to 63, Printed Record).

We don't believe that any fair-minded court could possibly come to any other conclusion in finding the facts, and certainly could not apply them differently than was done under the rule.

The Court of Appeals, at page 7 of their printed opinion, after quoting in full the finding of fact by the District Court (page 100 [4], Printed Record) on this point, states:

> "We have read the testimony and have no doubt but that the court's finding has ample support. Such being the case, we accept the finding and it follows that we agree with the court's conclusion on this phase of the case."

There was no conflict of evidence and no controversy, and there has been no conflict about the applicable rule or law; therefore we can see no sound reason for allowing the writ upon this ground.

CONCLUSION.

Point I. All the questions raised are now "moot," because no supersedeas bond was filed on the appeal from a final judgment of dismissal in the District Court.

Point II. The question attempted to be raised is hypothetical and frivolous, and does not arise under the facts in this case.

The jurisdiction of the court is invoked by the filing of the petition. An equity of redemption is affected **only** at the time of the filing.

Point III. There is no property interest after the expiration of the right to redeem. A naked legal title is not a property interest.

Point IV. All the circumstances of the situation, and particularly debtor's own testimony, is conclusive that she was not a "farmer" under Sec. 75 (r).

For the reasons given in respondent's brief we ask the court to deny the petition.

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